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No. 90-1859

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1991

J. C. KEENEY,
Petitioner,

v.

JOSE TAMAYO-REYES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, IDAHO, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, AND WASHINGTON

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INTEREST OF AMICI CURIAE

Amici curiae are states that are substantially affected by the unlimited discretion that federal district courts currently enjoy to order evidentiary hearings in habeas corpus proceedings, however full and fair the state hearings were on the disputed factual issues. That unlimited discretion threatens the finality of state court factual determinations and, indirectly, of state court judgments. Amici curiae support the State of Oregon in urging reversal of the court of appeals' decision in this case.

SUMMARY OF ARGUMENT

Townsend v. *Sain* allows a federal habeas court unlimited discretion to hold an evidentiary hearing on any issue resolved by a state court no matter how full and fair the state hearing was, no matter how adequately developed the material facts were, and no matter how fairly in the record the state's finding rests. In light of this Court's recent pronouncements on the delicate interests of finality and comity that federal habeas corpus implicates, and the circumscribed role that the great writ must accordingly play, *Townsend* stands as an anachronism and an anomaly: an anachronism because it strikes a balance that this Court unconditionally abandoned in *Coleman* v. *Thompson*; an anomaly because *Townsend* allows a federal habeas court to assume the primary fact finding role in a proceeding that Congress intended and this Court declared to be collateral and secondary.

Consistent with this Court's decisions recognizing the state's vital interests in protecting the finality of its judgments, and the limited role which habeas corpus necessarily serves, a state prisoner should not receive an evidentiary hearing unless he can show that he was unlawfully deprived of a state hearing on the finding he disputes. Such a deprivation will be found only when the prisoner can show that some objective factor external to the defense impeded him. Absent this showing, a federal court should not hold an evidentiary hearing.

ARGUMENT

PRINCIPLES OF COMITY AND FEDERALISM REQUIRE THAT THE SCOPE OF FEDERAL COURT POWER TO HOLD EVIDENTIARY HEARINGS BE NARROWLY CIRCUMSCRIBED.

This case raises the question of when a federal habeas court is authorized to hold an evidentiary hearing on a disputed state factual finding. The answer lies in the proper balance that must be struck in federal/state relations when the federal court exercises its habeas corpus jurisdiction.

I. Scope of Federal Court Power to Hold Evidentiary Hearings Under Current Law

A. Townsend v. Sain

Federal courts have traditionally looked to *Townsend* v. *Sain*, 372 U.S. 293 (1963), in determining whether to hold an evidentiary hearing. *Townsend* established the following test for mandatory evidentiary hearings:

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing

reliably found the relevant facts." 372 U.S. at 312-313 (footnote omitted).

Although the Court stated that "[i]t would be unwise to overly particularize this test," it nevertheless set forth specific criteria that, if shown, necessitated an evidentiary hearing:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."[1] *Id.* at 313.

The Court noted that the "final category is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded." *Id.* at 317. Beyond the circumstances for mandatory hearings, the Court gave district court's unlimited discretion to hold evidentiary hearings:

1. As to factor (5), the Court required the petitioner to demonstrate that his failure to develop the material facts was not attributable to his "inexcusable neglect." *Id.* at 317.

> "In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. *If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.*" *Id.* at 318 (emphasis added).

"Ordinarily," the complete record of state court proceedings is indispensable to determining whether the petitioner received a full and fair hearing in state court. *Id.* at 319. Nevertheless, "there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so." *Id.*

B. Rule 8 of the Rules Governing Habeas Corpus Proceedings

In 1976, Congress adopted Rule 8 of the Rules Governing Habeas Corpus Proceedings, which provides in relevant part:

> "If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an

evidentiary hearing is required." Rule 8(a), 28 foll. § 2254.

The Advisory Committee Note to Rule 8 explains that the circumstances governing both mandatory and discretionary evidentiary hearings are those set forth in *Townsend* v. *Sain*. Rule 8 provides, therefore, that "whether an evidentiary hearing is required" must be determined pursuant to relevant case law.

C. Applicability of 28 U.S.C. § 2254(d)

In contrast to *Townsend*, 28 U.S.C. § 2254(d) does not govern when a federal evidentiary hearing must be held, but when a federal habeas court must defer to state court factual findings. The statute provides that, when the state court has adjudicated the merits of a factual issue, the state court's findings are entitled to a presumption of correctness.[2/] 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449

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2. 28 U.S.C. § 2254(d) provides:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

U.S. 539, 547 (1981). Eight listed exceptions are available to defeat the presumption. 28 U.S.C. § 2254(d).

When the presumption of correctness is applicable, the burden rests on the petitioner to establish by convincing evidence that the state court's factual determination was erroneous. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. at 551. If the presumption is found inapplicable based on one of the enumerated factors, the petitioner need not meet the higher burden of proof to establish that the state's finding was erroneous. See *Sumner* v. *Mata*, 455 U.S. 591, 597-598 (1982). The statute does not address a petitioner's threshold entitlement to an evidentiary hearing. It is on this issue that 28 U.S.C. § 2254(d) and *Townsend* are critically different.[3/]

Section 2254(d), which postdates *Townsend*, limits, rather than expands, federal court jurisdiction to review state court rulings. "The present codification of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal courts,' *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction." *Sumner* v. *Mata*, 449 U.S. at 547-548, n.2. In its 1966 limiting amendment to section 2254(d),

3. The Advisory Committee Note to Rule 8 relies primarily on *Townsend* v. *Sain* as a basis for determining when an evidentiary hearing is mandatory. The Note states further, however, that if a petitioner shows one of the eight enumerated factors in 28 U.S.C. § 2254(d), a federal evidentiary hearing may be "force[d]." As noted above, § 2254(d) does not purport to establish when a federal evidentiary hearing is required. Both the plain language of the statute and its Legislative History leave no doubt on that point. To the extent that the Advisory Committee Note implies otherwise, it is simply incorrect.

Congress established that factual findings made by the state court system must be presumed correct in the absence of any of the eight enumerated factors. *Id.* at 550-551; 1966 U.S. Code Cong. & Ad. News 3663-3665.

By enacting the statutory presumption of correctness applicable to state court determinations of the merits of factual issues, Congress limited but did not eliminate the power of federal habeas courts to reach contrary factual determinations. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. at 550-551; 1966 U.S. Code & Cong. Ad. News 3663-3667. Under *Townsend*, federal courts retain unlimited power to hold evidentiary hearings. Although the statutory presumption applies at such hearings, it does not bar them. 28 U.S.C. § 2254(d). Because it does not bar them, no state finding is secure in its finality.

II. Considerations Relevant to Federal Court Deference to State Court Factual Adjudications

This Court has long recognized that comity and finality must be considered in determining the proper scope of federal habeas review. *Teague* v. *Lane*, 489 U.S. 288, 308 (1989). As Justice Harlan stated, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (separate opinion of Harlan, J.) Since *Mackey*, this Court has "moved in the direction of reaffirming the relevance of the likely accuracy of convictions in

determining the available scope of habeas review." *Teague* v. *Lane*, 489 U.S. at 313.

Considerations of comity and finality have been found relevant to whether decisions announcing new rules should be applied retroactively on collateral review, *Teague* v. *Lane*, 489 U.S. 288, and to the proper scope and application of the doctrines of abuse of the writ, *McCleskey* v. *Zant*, __ U.S. __, 111 S.Ct. 1454 (1991), and procedural default, *Coleman* v. *Thompson*, ___ U.S. ___, 111 S.Ct. 2546 (1991). As this Court stated in *McCleskey* v. *Zant*:

"The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.' [Citation.] And when a habeas petitioner succeeds in obtaining a new trial, the '"erosion of memory" and "dispersion of witnesses" that occur with the passage of time,' [citation], prejudice the government and diminish the chances of a reliable criminal adjudication. Though *Fay* v. *Noia, supra,* may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality. [Citations.]" 111 S.Ct. at 1468-1469.

The federal court's power to relitigate matters conclusively decided by the state court implicates these

concerns no less. The importance of finality is even greater with respect to factual, as opposed to legal, determinations. When the habeas petitioner succeeds in obtaining a federal evidentiary hearing, the '"erosion of memory' and 'dispersion of witnesses' that occur with the passage of time" severely prejudice the state and diminish the chance of a reliable factual adjudication. *Cf.* *McCleskey* v. *Zant*, 111 S.Ct. at 1474 ("By failing to raise the *Massiah* claim in 1981 [in his state post-conviction petition], McCleskey foreclosed the procedures best suited for disclosure of the facts needed for a reliable determination.")

When presented with claims of insufficient evidence or claims of clearly erroneous trial court factual findings, state courts of appeal have nct found it necessary to hold evidentiary hearings to relitigate those facts. It has long been the practice of those courts to review all factual claims on the record presented, giving deference to trial court factual determinations where appropriate. To require the state to relitigate factual matters in federal court, often years after the original state proceeding, places a burden on the state that is wholly unwarranted in all but the most extraordinary circumstances.

No principled reason exists, under this Court's view of the proper role of federal courts on habeas corpus, to allow those courts to do in collateral proceedings what state reviewing courts (or even federal reviewing courts) cannot do on direct appeal. Certainly Congress, when it enacted section 2254(d), did not intend to authorize such broad federal review. See *Marshall* v. *Lonberger*, 459 U.S. 422, 434-435 (1983). But the existence of broad federal habeas review under *Townsend* may give litigants who seek

an evidentiary hearing, like those who sought to file abusive petitions, "incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *McCleskey* v. *Zant*, 111 S.Ct. at 1469; *cf. Murray* v. *Carrier*, 477 U.S. at 491-492. On the other hand, a greater restriction on federal evidentiary hearings will compel litigants to view the state court proceedings as the "main event," rather than a "tryout on the road" for what will later be the determinative evidentiary hearing. *Cf. Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

III. A Federal Court's Discretion to Hold an Evidentiary Hearing Must Be Narrowly Circumscribed

In *Coleman* v. *Thompson*, this Court stated that *Fay* v. *Noia*, 372 U.S. 391 (1963), "was based on a conception of federal/state relations that undervalued the importance of state procedural rules," and that it "now recognize[d] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." 111 S.Ct. at 2565. The same may be said of *Townsend*'s approach to state court adjudications of the merits of factual issues.

Townsend noted that a state court adjudication of facts was entitled to some deference, but nonetheless granted virtually unlimited power to federal courts to hold evidentiary hearings in order to relitigate factual issues conclusively determined by state courts. If state procedural rules can bar *any* consideration of a claim

raised by a federal habeas petitioner, absent a showing of cause and prejudice or fundamental miscarriage of justice, see *Coleman* v. *Thompson*, 111 S.Ct. at 2565-2566, a state court adjudication of the merits of a factual issue should similarly bar federal court relitigation of the same issue, absent extraordinary circumstances.

In *Brown* v. *Allen*, 344 U.S. 443 (1953), this Court concluded that, "[w]here the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required." *Id.* at 463. The *Townsend* Court found the *Brown* v. *Allen* standard "too general," and chose instead to delineate specific circumstances which, if shown, required an evidentiary hearing. *Townsend* v. *Sain*, 372 U.S. at 313. This Court's recent decisions in the areas of procedural default and abuse of the writ demonstrate, however, that *Townsend*'s approach, like that in *Fay* v. *Noia*, was based on a misconception of federal/state relations that undervalued the importance of state court rulings, and failed to strike the proper balance between co-equal sovereigns.

A. A District Court's Discretion to Hold an Evidentiary Hearing Must be Defined in a Manner Consistent with Principles Governing Habeas Corpus Generally.

When it enacted 28 U.S.C. § 2254(d), Congress implicitly recognized that a federal evidentiary hearing may occur even if there has been a full and fair state hearing on the disputed issue. That recognition does not

affect this Court's authority or obligation further to define and limit a district court's discretion to hold such hearings.

The Court exercised that authority in *McCleskey*, where it addressed the limits of a district court's discretion to entertain abusive petitions under 28 U.S.C. § 2244(b) and Rule 9(b) of the Rules Governing Habeas Corpus Proceedings.[4] The Court noted that, although section 2244(b) provided that district courts "need not entertain" abusive petitions, it did not state any limits to a district court's authority to overlook a deliberately withheld or otherwise abusive claim to entertain the petition in any event. "That is, it does not state the limits on the district court's discretion to entertain abusive petitions." *McCleskey* v. *Zant*, 111 S.Ct. at 1466.

Section 2254(d) similarly does not state the limits of a district court's discretion to hold an evidentiary hearing regardless whether a hearing has already been held in the state court. Section 2254(d) thus poses the same question posed by section 2244(b), *see McCleskey* v. *Zant*, 111 S.Ct. at 1466, and presents the states with the same dilemma: at what point does a federal habeas court's discretion to hold an evidentiary hearing abuse the states' sovereign power to punish offenders.

In *McCleskey*, this Court stated that "Congress did not intend § 2244(b) to foreclose application of the court-

4. 28 U.S.C. § 2244(b), enacted together with 28 U.S.C. § 2254(d), established a qualified application of the doctrine of res judicata. 1966 U.S. Code Cong. & Ad. News 3663-3664; *see McCleskey* v. *Zant*, 111 S.Ct. at 1466. Rule 9(b), adopted ten years later with Rule 8 of the Rules Governing Habeas Corpus Proceedings, confers authority to dismiss repetitive and abusive petitions. *McCleskey* v. *Zant*, 111 S.Ct. at 1466-1467.

announced principles defining and limiting a district court's discretion to entertain abusive petitions." 111 S.Ct. at 1466. The Court thereafter defined and limited the district court's discretion under section 2244(b) and Rule 9(b). 111 S.Ct. at 1466-1471. The same application of court-announced principles defining and limiting a district court's discretion to hold an evidentiary hearing is required here.

Section 2254(d) does not speak to the necessity of holding an evidentiary hearing; rather, it governs the burden of proof with respect to a federal court's review of state court factual determinations. Rule 8 provides that the federal court, if it has not previously dismissed the petition, shall "determine whether an evidentiary hearing is required." Thus, notwithstanding the existence of a statute granting a federal court jurisdiction to hold an evidentiary hearing, this Court, in the exercise of its supervisory authority, may limit the discretion of the lower federal courts to hold such hearings, as it limited the district court's discretion to entertain abusive petitions in *McCleskey*.

Under current law, *Townsend* v. *Sain* defines the circumstances requiring an evidentiary hearing. *McCleskey* and *Coleman*, however, now compel the view that *Townsend* failed to strike the proper balance between state and federal courts with respect to the adjudication of factual issues. *Townsend* went far beyond defining when an evidentiary hearing is mandatory. It gave federal courts unlimited discretion to hold such hearings.

In its attempt to limit that discretion, Congress provided that a "determination after a hearing on the merits of a factual issue, made by a State court of

competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct," unless the petitioner shows the existence of a statutory exception to that presumption. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. at 546-548.

Not only should the above-described state court determination be presumed correct, it should be conclusive on the issue whether an evidentiary hearing in federal court may be held at all. Where the state court, after a hearing, has determined the merits of a factual issue, no relitigation of that factual issue should occur in federal court, absent a showing that an impediment to the presentation of the factual claim was caused by some factor external to the defense.[5/]

What constitutes a "determination on the merits of a factual issue" has been broadly defined by this Court:

> "[T]he California Court of Appeal made the factual determinations at issue here and it did so after a review of the trial court record. Nevertheless, it clearly held a 'hearing' within the meaning of § 2254(d). Both respondent and the State were formally before the court. Respondent was given an opportunity to be

5. There may also be cases in which a hearing was not held because the petitioner failed to present the claim in the first instance or was otherwise procedurally barred. In that event, the doctrine of procedural default will bar any federal court consideration of the claim absent a showing of cause and prejudice, or a fundamental miscarriage of justice. *See Coleman* v. *Thompson*, 111 S.Ct. at 2565.

> heard and his claim received plenary consideration even though he failed to raise it before the trial court. After respondent presented his case to the state appellate court, that court concluded in a written opinion that 'the facts of the present case' did not adequately support respondent's claim. Since that court was requested to determine the issue by respondent, we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d). . . . ¶ . . . Section 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. [Citation.] This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts." *Sumner* v. *Mata*, 449 U.S. at 546-547.

Just as state reviewing courts adjudicate claims pursuant to applicable standards of review, and accept or reject factual determinations pursuant to those standards, so, too, should federal courts in collateral proceedings adjudicate the constitutional claims before them. In so doing, federal courts must accord all deference due state court factual determinations. Only upon a showing that the state actually impeded the presentation of a petitioner's claim may a petitioner be entitled to a federal evidentiary hearing.

B. Factors Constituting an External Impediment to Presentation of the Claim in State Court.

In *McCleskey*, this Court stated, with reference to procedural default cases, that "the cause standard requires the petitioner to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court." 111 S.Ct. at 1470, citing *Murray* v. *Carrier*, 477 U.S. at 488. Objective factors constituting cause include interference by state officials, constitutionally ineffective assistance of counsel, and a showing that the factual or legal basis for a claim was not reasonably available to counsel. *Id*; *see Coleman* v. *Thompson*, 111 S.Ct. at 2566-2567. The *McCleskey* Court concluded that the same cause standard should apply to cases involving abusive writ petitions. 111 S.Ct. at 1470.

The factors constituting cause enunciated in *McCleskey* and *Coleman* should also govern the availability of an evidentiary hearing in a federal habeas proceeding. Accordingly, in order to receive a federal evidentiary hearing, a petitioner must show that some objective factor external to the defense impeded his efforts to have his claim determined in the state courts.

A petitioner may satisfy his burden by showing that the state actually interfered with his ability to present the claim, such as by withholding material evidence relevant to a fair disposition of the claim. He may also show that the state court erroneously declined to determine the merits of his claim by relying on a state procedural rule which is not consistently or regularly applied. *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988).

Additionally, a petitioner may satisfy his burden by showing that he was denied constitutionally effective counsel. To do so, however, the petitioner must first establish that he had a constitutional right to counsel. *Coleman* v. *Thompson*, 111 S.Ct. at 2566-2567. A defendant has a constitutional right to counsel in his first appeal as of right; he does not have a constitutional right to counsel in state post-conviction proceedings. *Id*. at 2566, 2568; *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987); *see McCleskey* v. *Zant*, 111 S.Ct. at 1471. Accordingly, a petitioner cannot claim that he was denied constitutionally effective assistance of counsel in state collateral proceedings. *Coleman* v. *Thompson*, 111 S.Ct. at 2566. Where a defendant has no right to assistance of counsel, he must "bear the risk of attorney error." *Id*. at 2566-2567. On the other hand, if he establishes his entitlement to counsel, the federal habeas petitioner must further demonstrate that he has separately raised and exhausted his claim of constitutionally ineffective counsel. *Murray* v. *Carrier*, 477 U.S. at 488-489.

A petitioner may in some cases be able to establish that his claim is "'so novel that its legal basis [was] not reasonably available to counsel.'" *Id*. at 489-490, citing *Reed* v. *Ross*, 468 U.S. 1, 16 (1984); *see Coleman* v. *Thompson*, 111 S.Ct. at 2566; *McCleskey* v. *Zant*, 111 S.Ct. at 1470. Whether a petitioner is entitled to a federal hearing, however, depends upon whether the claim can survive the *Teague* retroactivity bar. *See McCleskey* v. *Zant*, 111 S.Ct. at 1470-1471; *Teague* v. *Lane*, 489 U.S. at 311-313.

If a petitioner cannot establish an external impediment under the above criteria, and no state court

hearing was held on the disputed issue, the federal court may hold an evidentiary hearing only if review of the petitioner's claim is necessary to correct a fundamental miscarriage of justice. "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray* v. *Carrier*, 477 U.S. at 496. Similarly, if a petitioner demonstrates that a hearing is necessary to establish his factual innocence, a federal court retains discretion to hold a hearing even in the absence of establishing an external impediment to the presentation of his claim.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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